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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 675

JOHN T. DEMPSEY, as Administrator of the Estate of
Gabriel de Fontarce, Deceased,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.

LOUIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.



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vs.

GUARANTY TRUST COMPANY OF NEW YORK,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, John T. Dempsey, as Administrator of the Estate of Gabriel de Fontarce, deceased, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit

affirming a judgment dismissing petitioner's Amended Complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

John T. Dempsey, petitioner, was appointed (upon the petition of a creditor) by the Probate Court of Cook County, Illinois, administrator of the Estate of Gabriel de Fontarce, a free Frenchman who died in London, England in June of 1941 and who, at the time of his death, was domiciled either in Great Britain, Egypt, Eire or France (R. 4-5, 141). In his sworn Amended Complaint petitioner showed that respondent, a New York corporation *authorized to do and doing business in Illinois*, held physical possession, as mere custodian or depositary, of certain securities called "kaffirs" of a value of \$120,000 belonging to the decedent (R. 3-5). Petitioner sought recovery of these securities so that they might be administered *in Illinois* (R. 11).

Decedent had never been resident or domiciled in the United States and his estate was being administered in England and Brazil, and possibly in Ireland, France and Monaco (R. 4-5). Petitioner showed that *decedent left no debts in any state of the United States except in Illinois* and that decedent's estate in Illinois would be *insolvent* unless respondent delivered said assets to petitioner (R. 5).

Petitioner showed that although decedent's niece had attempted to start ancillary administration in New York, her petition had never been granted and no administration had ever been commenced by appointment of a representative of said estate in New York; that no jurisdiction

in rem or *in personam* had ever been obtained by the New York court; and that decedent's niece had no objection to the administration of said assets by petitioner in the Probate Court of Cook County (R. 10).

Petitioner further showed that ancillary administration in New York would be utterly useless and wasteful of the assets concerned; that no inheritance, succession or other taxes were due to the State of New York on account of said assets; that the Surrogate's Court of New York had no power or authority to make any final distribution of said assets to decedent's ultimate heirs or distributees; and that New York administration would be particularly wasteful by reason of the court costs, administrator's fees and attorneys' fees of such administration (R. 6-9).

Petitioner further offered to obtain a waiver of any New York succession or other taxes on said assets or to pay any taxes found to be due and unpaid (R. 8). Petitioner showed that respondent claimed \$10.43 as custodian fees, but denied that any such sum was due (R. 9-10). Petitioner showed, on the contrary, that respondent was substantially overpaid for its custodian services on decedent's death; but petitioner offered to pay any custodian fees found to be due or to constitute a lien or charge on said assets (R. 9-10).

Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference thereto) there were no assets or securities belonging to decedent in New York upon which any administration proceedings could be based (R. 10).

Respondent filed a motion to dismiss the verified Amended Complaint supported by affidavits (R. 23). The trial court held that the proceeding pending in the Probate Court of Cook County, Illinois is an ancillary one and therefore limited to the administration of assets physically found within the jurisdiction of that Court; and that although the respondent does business in Illinois and was served there, so that the District Court had full jurisdiction over respondent, nevertheless such jurisdiction did not constitute "jurisdiction over any of decedent's property which at the time of his death was located in New York or anywhere else outside of Illinois" (R. 112). The District Court further found, in spite of the sworn allegations in the Amended Complaint directly to the contrary, that the New York Surrogate's Court had "first acquired and still retains jurisdiction over any assets belonging to Gabriel de Fontarce which at the time of his death were located in the State of New York," and that "until the matter there pending is disposed of, this Court will not interfere and attempt to exercise any jurisdiction over assets now in the control of the Surrogate Court of New York, even if it had authority, which it does not believe it has, to direct that such assets be turned over to the Illinois Administrator" (R. 113). The District Judge thereupon dismissed the Amended Complaint (R. 113).

From this order dismissing the Complaint, petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit; and that Court on November 12, 1943 affirmed the judgment below upon the ground that petitioner by his grant of ancillary letters of administration "obtained only a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois," citing

11 R. C. L. on Executors and Administrators, Sec. 529; and Woerner, American Law of Administration, 3rd Ed. Vol I, Sec. 157 (R. 147). The Circuit Court based its decision also upon the finding that the New York Surrogate's Court "had assumed jurisdiction upon the filing of the petition" and that "it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained" (R. 148).

Although the Circuit Court's opinion does not so state, this conclusion is likewise squarely in conflict with the sworn allegations regarding the actions and jurisdiction of the New York Surrogate's Court contained in the sworn Amended Complaint (R. 8-10).

This petition seeks to review this judgment of the Circuit Court of Appeals.

Statement of Basis of This Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case directly conflicts, upon a question of Federal law, with all of the decisions of this Court and all of the other Circuit Courts of Appeals.

The Questions Presented.

There is one question presented:

Should a useless and expensive ancillary administration be permitted in one state (New York) when the Federal court of another state (Illinois), where ancillary administration is necessary and has been commenced, has sufficient jurisdiction over a corporation holding assets

belonging to the same decedent to compel such corporation by an *in personam* decree to deliver such assets, or to pay the value thereof in money, to the administrator in the latter jurisdiction? In other words, was there a cause of action stated in petitioner's sworn Amended Complaint?

Reasons for the Allowance of the Writ.

As shown below in our Argument, it amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is *directly in conflict upon a question of Federal law* with the decisions of this Court in *New England Life Insurance Co. v. Woodward*, 111 U. S. 138, and *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, and with the decisions of the inferior Federal courts upon the same question.

The question involved is important. It involves a determination of the authority of the Federal courts to grant full *in personam* relief against a corporation properly sued within the jurisdiction of the Federal court, especially where the exercise of this jurisdiction will prevent a useless and expensive ancillary administration in another state. This is the principle enunciated by this Court in *New England Life Insurance Co. v. Woodward*, 111 U. S. 138 and *Equitable Life Assurance Society v. Brown*, 187 U. S. 308 above referred to.

Wherefore, petitioner prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end

that this cause may be reviewed and determined by this Honorable Court as provided by the laws and Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

JOHN T. DEMPSEY, as Administrator
of the Estate of Gabriel de
Fontarce, deceased,

Petitioner.

By LEWIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.